IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 92

MABEL BLACK and T. Y. WULFF, in a representative capacity for, by and on behalf of Bio-Lab Union of Local 225, United Office and Professional Workers of America, its officers and members,

Petitioner,

vs.

CUTTER LABORATORIES, a corporation,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of California

BRIEF FOR AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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Interest of American Civil Liberties Union

The American Civil Liberties Union is a nationwide nonpartisan organization with the sole objective of protecting and advancing civil liberties—of helping to maintain the rights of the individual against deprivations and oppression by Government and to preserve the freedom of political

belief and expression essential to the functioning of a democracy. The decision for review in the case at bar fails, *amicus* believes, to afford the protection to individual rights envisaged by our Constitution. It attaches supreme and exclusive importance to protection of the safety of the State, against even the most supposititious dangers in the indefinite future, and sets the value of protecting the rights of the individual at zero. The mere conjecture of danger to the body politic—here through possible sabotage in a hypothetical future war—cannot be allowed to blot out all other considerations.

Further, the decision is a step in destroying the principle of justice and equal protection for all, in that it oppresses a hated minority to an extent which is not rationally required by the public safety. To maintain just and humane government, there must be particular care when a disliked minority is involved to determine whether a measure is reasonable, and not merely an expression of exaggerated alarm stemming from deep-seated aversion for the minority.

The judgment at bar further concerns *amicus* because nothing has been factually established with regard to the particular individual whose rights are here abrogated other than her political belief; all else leading to the conclusion of the Supreme Court of California that there is danger in her reinstatement in respondent's employ, is supposition and generalization added onto the fact of such belief. It would be a destructive precedent to lightly infer danger from political belief. There must be a demonstration of caution; and of greater caution than that evidenced in the State court decision, if our principles of political freedom are to be maintained.

Because of *amicus'* devotion to democracy and civil liberties, it is necessarily and most fervently opposed to Communist totalitarianism and its abrogations of civil and political liberty. As to the American Communist Party,

amicus realizes it has a dual nature, engaging publicly in the forms of expression and association usual to political parties and organizations, but also engaging covertly in anti-democratic and treacherous methods in aid of the aims of Soviet Russia. In regard to the former—the Party's political activities—*amicus* perceives that they pose no present threat to our democracy in that there is no conceivable danger of establishment of a totalitarian government in this country through the political activity of American Communists. On the other hand, there *is* a threat to Constitutional liberty in that a failure to protect civil rights and liberties when a case involves a Communist spells the impairment of the principles of liberty as the controlling standards and guarantees for all of us.

In regard to the possibility of espionage or sabotage by Communists, *amicus* of course believes the Government must take appropriate measures against the danger of such acts. However, exaggeration of the pervasiveness and extent of this peril, causing in turn an exaggerated fear of Communists and Communism in this country, has unfortunate repercussions on freedom of political belief and expression. In the minds of many, non-conformist political thought is erroneously identified with Communism,[1] and is accordingly shunned and feared along with apprehension about treacherous acts, as fear of Communists mounts. There is in consequence a widespread discouragement of the free and fearless political thought and expression that the First Amendment was intended to encourage.

Statement of Facts

The facts are stated in the briefs of the parties.

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[1] "Nothing is more pernicious than the idea that every radical measure is 'Communistic' or every liberal-minded person a 'Communist'. One of the tragedies of our time is the confusion between reform and Communism." *Communications Assn.* v. *Douds*, 339 U. S. 382, 439, note 11 (Jackson, J., concurring in part).

Points To Be Argued by Amicus

I. The judgment of the highest court of California violates the due process and equal protection clauses of the Fourteenth Amendment to the Constitution.

II. The judgment of the highest court of California violates the Federal supremacy clause of Article VI of the Constitution.

It is clear that the Constitutional points to be argued by *amicus*, as well as the others presented by petitioner, are properly before this Court for review. All these points were presented for the consideration of the highest Court of California by petitioner's petition for rehearing in that Court (R. 500, 507, 519). That, under State procedure, they could then appropriately be considered by that Court, is indicated by the vote of three judges that the petition for rehearing be granted (R. 523). Thus, the State Court had the opportunity to consider these Constitutional contentions, and it in effect held them to be invalid by its denial of the petition for rehearing. Petitioner could not have anticipated the necessity for raising these Constitutional questions prior to the State Supreme Court's decision, since there had not theretofore been any hint that unconstitutional action would be taken.[2] All these questions were then presented in the petitioner's petition for certiorari in this Court. Thus, they are now properly before this Court for consideration.

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[2] See decisions of lower California courts, Appendix to Petition for Certiorari, pp. 50-77.

See *Great Northern Railway Co.* v. *Sunburst Oil & Refining Co.*, 287 U. S. 358, 367; *Lawrence* v. *State Tax Commissioners*, 286 U. S. 276, 282; *Missouri* v. *Gehner*, 281 U. S. 313, 320; *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U. S. 673; *Saunders* v. *Shaw*, 244 U. S. 317

ARGUMENT

I. The judgment of the highest Court of California violates the due process and equal protection clauses of the Fourteenth Amendment to the Constitution.

An arbitration board designated by agreement between petitioner Union and respondent determined that a Union officer named Doris Walker had been discharged from her position as a clerk-typist in the purchasing department of respondent's plant, in violation of respondent's contract with the Union. The discharge, the arbitration board found, violated contract provisions that respondent would not interfere with its employees nor discriminate against them in regard to tenure of employment, because of Union activity (R. 32, 6). Pursuant to the applicable provision of the contract the board therefore directed Walker's reinstatement in respondent's employment (R. 32, 6). While she had been a member of the Communist Party (R. 29), the board found that neither her membership nor any implications therefrom were the reasons respondent discharged her (R. 32). In the decision of the Supreme Court of California here for review, it assumed the correctness of the arbitrators' decision that the discharge violated the contract and that Walker's membership in the Communist Party was not the reason for her discharge (R. 469). The Court refused nevertheless to enforce the contract provisions prohibiting discharges for Union activity and requiring reinstatement in case of such discharge, as well as the arbitration award based thereon, holding that it would be against public policy to direct Walker's reinstatement in employment in view of her Communist Party membership (R. 469, 488).

The justification the Court offered for this abrogation of the Union's and Walker's rights was that respondent manufactures antibiotics and various medical supplies for both military and civilian use (R. 469), and that since Walker

was a Communist, it would be assumed she had "dedicated herself * * * to the practice of sabotage" and would commit "acts of sabotage * * * at any time such acts may be directed by the party leader" (R. 485, 488).

The Court did not elucidate when or how these assumed acts of sabotage would take place. It noted that there had been Federal security regulations in respondent's plant during World War II, but that none had been imposed since then (R. 469-470). Thus it is apparent that the Federal government, despite its program for protection against industrial sabotage, is not concerned about any current danger of sabotage in respondent's plant. It is also clear that there had been no attempts at sabotage during the three years of Walker's employment prior to her discharge in 1949 (R. 470-478; 16-17). Thus, there is nothing which would give the Court a reasonable basis for its acute fear of sabotage, in the current situation or if it remains unchanged. It is perhaps a more rational interpretation of the decision to assume the Court had in mind the possibility of sabotage during a hypothetical war with Russia some time in the indefinite future. Either way, the decision involves the abrogation of rights on a highly speculative basis. As to Walker's particular work, the Court assumed the correctness of the facts found by the arbitrators (R. 469); they entirely negative her connection with anything that might conceivably be considered a "sensitive" operation, assuming *arguendo*, that anything in the plant should be so categorized. Walker was a "Clerk Typist in the Purchasing Department. She worked at a desk in the same room with her supervisor. There she received purchase requisitions which she typed on purchase orders which were signed by the Purchasing Agent, whereupon she would mail out copies to the vendor and to others in various departments of the Company. She also did general typing for the department" (R. 16).

Fourteenth Amendment rights in issue.

On the basis, then, of a highly conjectural fear of sabotage, the California judgment interferes with the liberty protected by the due process clause of the Fourteenth Amendment and with the equal protection guaranteed by that Amendment. The California Court here refuses to give the same enforcement to the contract right to reinstatement and to the arbitration award directing reinstatement, that it generally gives to such contracts and such arbitration awards and that is provided by California statutes.[3] The petitioner, Union and the affected employee have been denied their equal right to a judicial remedy, to court aid in securing their rights—a most essential and firmly established phase of equal protection of the laws.[4] This denial in turn interferes with the right of the individual to contract, here through her agent the Union, for employment and to enjoy the fruits of the contract; it deprives her of her right to get and keep employment, and thus curtails her basic right to work, to make a living and survive economically.[5] Certainly these rights are vital aspects of the liberty assured by the Amendment.[6]

As the dissenting judges indicated (R. 494), if the instant contract will not be enforced in Walker's favor be-

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[3] As to the California statutes, see R. 478 and Appendix to Petition for Writ of Certiorari, pp. 56-7. See also R. 493.

Equally with court enforcement of a contract, the court's refusal to enforce a contract in the same manner as it would enforce any other contract, is State action reviewable under the Fourteenth Amendment to determine whether the discrimination is reasonable. See *Shelley* v. *Kraemer*, 334 U. S. 1, 14-18, and cases there cited.

[4] See, i.e., *Dowd* v. *Cook*, 340 U. S. 206, 208. And see *Accardi* v. *Shaughnessy*, 347 U. S. 260, and cases therein cited at note 7, as to the right to secure whatever procedure is regularly prescribed and customary.

[5] The rights of the individuals affected by the contract and by the State court's judgment unquestionably must be considered in this proceeding between their representative, the Union, and respondent. This is an *a fortiori* conclusion from *Barrows* v. *Jackson*, 346 U. S. 249, and cases cited at pp. 257-258.

[6] See *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589; *Meyer* v. *Nebraska*, 262 U. S. 390, 399; *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, 392.

cause of the highly remote and speculative danger of sabotage, almost any sort of employment contract would be equally unenforceable for a Communist—to prepare food, work on a construction project, run an elevator—as well as a wide variety of other contracts—of passage on a railroad, to lease a building, to buy property anywhere near a Western Union office or other public utility. Under the instant decision, the courts would approve the breach of any such contract with a Communist. It doesn't matter that the Communist affiliation had nothing to do with the breach; indeed, the result would be the same if the malfeasor did not even discover the Communist affiliation until after the breach. Further, if it were deemed reasonable State action for the California court to abrogate the contract right to work because Walker was a Communist, it would similarly be valid for the State to put its Court's theory in the form of an affirmative prohibition: that is, to prohibit Communists working in any type of plant where sabotage was conceivably possible.

Basis of fear of sabotage.

The fear of sabotage impelling the Court to this denial of a remedy and curtailment of rights, on the extraordinary ground of public policy, was not based on any conduct of the individual involved, nor indeed on any record of sabotage in peacetime, or even in wartime, including the recent Korean War, by American Communists. We do not say that if there were at some unforseeable time a war with Russia, such sabotage during such war is not a theoretical possibility, assuming the facts as to the American Communist Party would at that time be the same as now. We do say there is no *evidence* of sabotage by American Communists even in wartime. More important, for the present peacetime cold war situation, with which there is already years of experience, the conjecture there will be such sabotage is a conjecture *against* experience and established fact.

The unreliability of predictions that sabotage will be committed, even after a war has commenced and the enemy is therefore actual rather than conjectural, is established by this country's experience in World War II. Over 110,000 residents of Japanese ancestry were evacuated from their West Coast homes and other measures were taken against them, in large part because, due to their assumed loyalty to Japan, it was assumed they would commit acts of sabotage.[7] It was later established, however, that no such acts of sabotage were committed in Hawaii, where there was no evacuation, by similar residents of Japanese ancestry nor indeed on the West Coast when there was an opportunity for such acts.[8] This Court cautioned against the sacrifice of Constitutional liberties in the name of protection against sabotage, by its decision in *Ex Parte Endo*, 323 U. S. 283, invalidating the terminal restrictions on citizens of Japanese ancestry.

Not only is the California court quite heedless of fact in its ready prediction of sabotage, but also it is unconcerned with the lack of evidence as to the existence or kind of present Communist Party activity by Walker. Except for her refusals to answer questions about Communist Party membership, from which no affirmative inference can logically be drawn,[9] the only evidence of her membership is her statements, her activity on the Party's behalf in election

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[7] See *Hirabayashi v. United States*, 320 U. S. 81, 90, 92, 96-99; *Korematsu v. United States*, 323 U. S. 214; Dembitz, *Racial Discrimination and the Military Judgment: The Korematsu and Endo Decisions*, 45 (1945) Columbia Law Rev. 175, 207.

[8] See *Final Report, Japanese Evacuation from the West Coast*, by Lt. Gen. J. L. DeWitt, dated June 5, 1943, p. 34; *Korematsu v. United States*, 323 U. S. at p. 241 (Murphy, J., dissenting), Grodzins, *Americans Betrayed* (Univ. of Chicago, 1949), pp. 129-142, and Report of Commission to Investigate Pearl Harbor (headed by former Justice Owen D. Roberts) therein cited.

[9] *Quinn v. United States*, 349 U. S. 155, 164.

campaigns, etc., in and prior to 1946 (R. 475-6, 18-20).[10] With so little to go on as to the individual it was judging, the Court nevertheless inferred her Communist Party membership at the time of its decision in 1955, and, moreover, her readiness to commit sabotage.

The assumption that Walker might at any time commit sabotage as "a pawn in a conspiracy" is, like the assumption condemned by this Court in *Stack* v. *Boyle*, extreme and arbitrary.[11] The California Court in effect indulged in a conclusive presumption of the danger of sabotage by Walker; as this Court said in the *Wieman* case in speaking of disloyalty: "If the rule be expressed as a presumption of disloyalty, it is a conclusive one." *Wieman* v. *Updegraff*, 344 U. S. 183, 190. Here as there the presumption is not reasonably supported. This Court has recently had occasion to emphasize that inferences of guilt and of danger to the State cannot rest on such tenuous bases. See *Quinn* v. *United States*, 349 U. S. 155, 164. Even in the case of Government employment, there must be a showing, by more than conjecture, that "continued employment (is) * * * inconsistent with a real interest in the State." *Slochower* v. *Board of Higher Education of City of New York*, No. 23, decided April 9, 1956. Under these decisions, it is

[10] The arbitration board did not find it necessary to consider whether Walker was currently a Party member, because it found her Party connections were not the reason for her discharge. It certainly made no finding of her commitment to perform sabotage, saying only that the respondent's beliefs that Party members were so committed "were prevalently understood and shared" (R. 29).

[11] See *Stack* v. *Boyle*, 342 U. S. 1, 5-6, where this Court held that it was illegal to set unusually high bail for defendants in a Smith Act case, merely because some persons previously convicted in a Smith Act case had forfeited bail. This Court rejected the Government's assumption "without the introduction of evidence that each petitioner is a pawn in a conspiracy and will, in obedience to a superior, flee the jurisdiction. * * * Such conduct would inject into our own system of government the very principles of totalitarianism which Congress was seeking to guard against. * * * ". Compare *Tot* v. *United States*, 319 U. S. 463, 467-8.

clear that here "There has not been 'the protection of the individual from arbitrary action' which Mr. Justice Cardozo characterized as the very essence of due process." *Slochower* v. *Board of Education*, cited *supra*.

Government employment.

Though the right to Government employment is not protected by the due process clause quite as fully as the general and basic right to work in non-governmental employment,[12] this Court has not countenanced a curtailment even of Government employment on as speculative a basis as the California court used here. This Court has approved the State's restriction of the employment of Communists in a particular area of public employment when their beliefs indicated they might present an actual current danger in that area. *Adler* v. *Board of Education*, 342 U. S. 485, 493. It has also acquiesced in the view that Communist adherence might be relevant to fitness for public employment on the rather abstract ground that advocacy of overthrow of our form of Government shows a lack of that fidelity to the Government which it would expect of its employees. *Garner* v. *Los Angeles Board*, 341 U. S. 716, 720. But certainly the bridge between disbelief in our form of Government and loyalty to the employer cannot be stretched to cover the case of private employers. It would verge on absurdity for the State to require in private employment a state of mind showing abstract fealty to the employer, and it would be highly unreasonable for the State to abrogate the right to work because such fealty might be thought lacking. Thus, however explained, the California judgment goes much further on the road to restriction than this Court has yet gone, in that it curtails the right to work on the basis of a purely speculative possible future danger or a new type of employee loyalty requirement.

[12] Consider *Wieman*, 344 U. S. at p. 192.

In appraising the California decision under the Fourteenth Amendment, it is important to note that it is the State court and not the Legislature that has declared invalid the contract provision for reinstatement in employment, as applied to Walker. Under this judgment, the Court would make similar piecemeal retroactive public policy determinations whenever a breach of contract case came before it. There is no presumption in favor of the Court's ruling, such as would attach to a legislative enactment dealing with contract or employment rights; here there has been no broad legislative weighing of values, nor is the determination subject to review "'at the polls'." See *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 488, as to the respect to be accorded legislative determinations of policy.

Accordingly, we submit that the judgment of the California court violates the equal protection and due process clauses of the Fourteenth Amendment in that it abrogates without reasonable justification, on the most speculative hypothesis of danger, the right to equal judicial remedies, to equal enforcement of contract provisions and arbitral awards, and thus also the right to work assured by contract.

The California judgment was further unreasonable because Federal regulation of the whole matter of sabotage of defense facilities (see Point II), made the Court's abrogation of contract rights for the purpose of protection against sabotage unnecessary.

II. The Judgment of the highest court of California violates the Federal Supremacy Clause of Article VI of the Constitution.

It is common knowledge that Congress and its committees are continually studying the field of internal security in order to take all measures they deem necessary for national safety. Congress has been particularly mindful of the field of employment, and, as the dissenting judges in the State court pointed out (R. 496), dealt with the problem of employment of Communists in private industry in the Internal Security Act of 1950. As part of a large and complicated scheme of regulation, it ordained that the Secretary of Defense should designate defense facilities in which members of organizations designated as Communist-action organizations should not be employed. The recent holding of this Court in the case of *Pennsylvania* v. *Nelson*, No. 10, decided April 2, 1956, is thus fully applicable to the case at bar. There is here a comprehensive Congressional program, based on study of the whole subject, with respect to the rights and employment opportunities which should or should not be accorded Communists as well as anyone connected with the Communist movement. As this Court said in *Nelson*: "Taken as a whole, they (the statutes) evince a congressional plan which makes it reasonable to determine that no room has been left for the States to supplement it." Further, the state action "is not to be declared a help because it attempts to go farther than Congress has seen fit to go." Finally, in this case as in *Nelson*, the subject is subversion—indeed, sabotage of material connected with defense, which is here involved, is even more clearly a Federal matter than subversion in general. Thus, even more than in *Nelson*, we submit that "the federal statutes 'touch a field in which the federal interest is so dominant that the federal system (must) be assumed to preclude'" State action on the same subject. The California judgment therefore is unconstitutional.

CONCLUSION

It is respectfully submitted that the judgment of the Supreme Court of California should be reversed, and the case remanded thereto with a direction that its refusal to enforce the contract and the arbitrators' award is unconstitutional.

Respectfully submitted,

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